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In the Supreme Court of the United States

STATE OF ALASKA, PLAINTIFF

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO INTERVENE AND FILE ANSWER

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 128, ORIGINAL

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v.

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STATEMENT

On November 24, 1999, the State of Alaska invoked this Court's original jurisdiction to initiate an action against the United States under the Quiet Title Act of 1972 (QTA), 28 U.S.C. 2409a. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(b)(2). Alaska sought leave to file a bill of complaint asserting title to marine submerged lands in the vicinity of the Alexander Archipelago in southeastern Alaska. The submerged lands in question lie, for the most part, within the current exterior boundaries of the Tongass National Forest and the Glacier Bay National Park and Preserve. The United States did not oppose Alaska's motion, and, on June 12, 2000, this Court granted Alaska leave to file its complaint. The United States

filed its answer on August 25, 2000, and the matter was referred to Special Master Gregory Maggs. On December 14, 2000, Alaska sought leave to file an amended complaint. The United States did not oppose Alaska's motion, and, on January 8, 2001, this Court granted leave to file the amended complaint.

On February 26, 2001, Franklin H. James, Shakan Kwaan Thling-Git Nation (Shakan Kwaan), Joseph K. Samuel, and Taanta Kwaan Thling-Git Nation (Taanta Kwaan) (collectively movants) sought leave to file a motion to intervene and answer. James and Samuel allege that they are the First Chairholders and Tribal Spokesmen for Shakan Kwaan and Taanta Kwaan, respectively. Movants allege that Shakan Kwaan and Taanta Kwaan are bands of Thling-Git natives whose ancestral homeland is in southeastern Alaska. Neither Shakan Kwaan nor Taanta Kwaan is a recognized tribe having a government-to-government relationship with the United States. See 65 Fed. Reg. 13,298 (2000) (listing federally recognized tribes).

Movants claim no property rights to the submerged lands at issue in the quiet title action. Rather, they allege that, if submerged lands within the exterior boundaries of the Tongass National Forest belong to the United States, they would be entitled to engage in what they allege are subsistence uses of those submerged lands in accordance with Title VIII of the Alaska National Interest Lands Conservation Act (ANILCA), 16 U.S.C. 3111 *et seq.*

Title VIII of ANILCA provides that "the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes." 16 U.S.C. 3114. ANILCA defines subsistence uses as "the customary and traditional uses by rural Alaska

residents of wild, renewable resources for direct personal or family consumption as food, shelter, fuel, clothing, tools, or transportation; * * * for barter, or sharing for personal or family consumption; and for customary trade." 16 U.S.C. 3113. Thus, the beneficiaries of the priority are rural residents of Alaska, rather than the members of a specific tribe or organization.

Movants are among a group of plaintiffs that have previously asserted subsistence rights under ANILCA in the United States District Court for the District of Alaska. Shakan Kwaan, Taanta Kwaan, and others filed a complaint for injunctive and declaratory relief against, among others, the United States and the Federal Subsistence Board for refusing to consider and act upon their applications for the subsistence taking of herring roe on kelp. See *Peratrovich* v. *United States*, No. A92-734-CV (D. Alaska filed Dec. 2, 1992) (Complaint). In their complaint, they alleged that the United States, and not the State of Alaska, holds title to all submerged lands within the Tongass National Forest, making ANILCA and its subsistence use priority applicable to those submerged lands. The plaintiffs in *Peratrovich* also alleged in their complaint that their taking of herring roe was for the purpose of "customary trade," a subsistence use allowed by ANILCA, 16 U.S.C. 3113.

The *Peratrovich* plaintiffs filed a motion for preliminary injunction seeking to require the federal defendants in that case to issue certain subsistence fishing permits. Mot. for Prelim. Inj., *Peratrovich* v. *United States*, *supra*. The United States opposed the motion, arguing that plaintiffs had failed: (1) to carry their burden of showing that the United States had title to the submerged lands in question; (2) to show that the

use for which they sought the permits was a subsistence use; (3) to show that the Federal Subsistence Board acted unlawfully; and (4) to prove irreparable injury justifying an injunction. Response to Mot. for Prelim. Inj. at 20-27, *Peratrovich* v. *United States*, *supra*. On August 17, 2000, the United States District Court stayed the *Peratrovich* litigation pending a decision by this Court in the present case.

Movants claim they are entitled to intervene in the present case as a matter of right under Federal Rule of Civil Procedure 24(a) because they allegedly have a recognized interest in the subject matter of this litigation and will not be adequately represented by the United States. If they are not permitted to intervene as a matter of right, they ask in the alternative to be granted permissive intervention under Federal Rule of Civil Procedure 24(b).

ARGUMENT

THE MOVANTS' REQUEST FOR LEAVE TO INTERVENE SHOULD BE DENIED

This Court allows private parties and organizations to intervene in cases arising under its original jurisdiction only in compelling circumstances. Those circumstances are not present here. The State of Alaska filed this quiet title action against the United States to resolve a dispute between sovereigns over ownership of submerged lands. Movants do not claim any right of ownership; they simply assert that, if the United States owns the disputed acreage, they will be entitled to obtain permits to harvest herring roe on some of the submerged lands. Movants' interest in this litigation is indistinguishable from that of countless other persons who do not claim to own, but may wish to use, public lands. They do not have a sufficient stake in this inter-

governmental quiet title action to participate as parties. The motion for leave to intervene should therefore be denied.

A. Private Parties And Organizations May Intervene In Original Actions Only In Compelling Circumstances

Movants claim that they are entitled to intervene in this original action as a matter of right, or permissively, under Federal Rule of Civil Procedure 24. They are mistaken. The Federal Rules of Civil Procedure, by their own terms, govern procedure only "in the United States district courts." Fed. R. Civ. P. 1. When adjudicating original actions, this Court follows the Federal Rules of Civil Procedure as to the "form of pleadings and motions," but in other respects, the Federal Rules may only be "taken as guides." Sup. Ct. R. 17.2. See *Arizona* v. *California*, 460 U.S. 605, 614 (1983) (The Court's "own Rules make clear that the Federal Rules are only a guide to procedures in an original action."). Furthermore, the "Federal Rules are a guide to the conduct of original actions in this Court only 'where their application is appropriate.'" *Utah* v. *United States*, 394 U.S. 89, 95 (1969) (quoting Sup. Ct. R. 9(2), as then in force). This Court has made clear that, contrary to the practice in district courts, private entities may intervene in original actions only upon a showing of compelling need for their participation as parties.

The Framers of the Constitution assigned to this Court original jurisdiction over a limited class of intersovereign disputes. U.S. Const. Art. III, § 2; see 28 U.S.C. 1251(a) and (b)(2). The Court has repeatedly emphasized that this "delicate and grave" responsibility should be exercised "sparingly." *Mississippi* v. *Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Louisiana* v.

Texas, 176 U.S. 1, 15 (1900) and *Wyoming* v. *Oklahoma*, 502 U.S. 437, 450 (1992)). See, *e.g.*, *Maryland* v. *Louisiana*, 451 U.S. 725, 739 (1981); *Arizona* v. *New Mexico*, 425 U.S. 794, 796 (1976); *Utah*, 394 U.S. at 95. The Court has interpreted Article III and 28 U.S.C. 1251 as providing it "with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court." *Mississippi* v. *Louisiana*, 506 U.S. at 76 (quoting *Texas* v. *New Mexico*, 462 U.S. 554, 570 (1983)).

The Court has correspondingly given close scrutiny to intervention requests and has allowed private parties to intervene only upon a showing of compelling need. The Court identified the controlling principles in *New Jersey* v. *New York*, 345 U.S. 369 (1953), where the City of Philadelphia sought to intervene in a dispute between New Jersey, New York, and Pennsylvania over the use of the Delaware River and its tributaries. The Court denied Philadelphia's motion, noting that a State, "when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *Id.* at 372 (quoting *Kentucky* v. *Indiana*, 281 U.S. 163, 173-174 (1930)). The Court stated:

> The principle is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties.

Id. at 373. The Court observed that Philadelphia's interest in the dispute was no different from that of individual citizens who might be interested in the outcome and that, if Philadelphia were allowed to

intervene, the case could be "expanded to the dimensions of ordinary class actions." *Ibid.* The Court stated:

> An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state. See *Kentucky* v. *Indiana*, *supra*.

Ibid. Accord *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 97 (1972); see *Kentucky* v. *Indiana*, 281 U.S. at 173-174 ("An individual citizen may be made a party where relief is properly sought as against him, and in such case he should have suitable opportunity to show the nature of his interest and why the relief asked against him individually should not be granted.").

This Court has accordingly recognized that private individuals and organizations ordinarily "have no right to intervene in an original action." *United States* v. *Nevada*, 412 U.S. 534, 538 (1973). To the contrary, "[a] State is presumed to speak in the best interests of those citizens," and requests to intervene "may be treated under the general rule that an individual's motion for leave to intervene in this Court will be denied absent a 'showing [of] some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.'" *Nebraska* v. *Wyoming*, 515 U.S. 1, 21-22 (1995) (quoting *New Jersey* v. *New York*, 345 U.S. at 373). Although the Court originally identified those principles in the context of interstate disputes, they apply *a fortiori* to controversies between the United States and a State, where the same core sovereign interests are at stake. See *id.*

at 26 (Thomas, J., concurring in part and dissenting in part).

B. Movants Have Failed To Demonstrate An Adequate Interest Justifying Intervention

Alaska brought this action against the United States under the Quiet Title Act of 1972, 28 U.S.C. 2409a(a), which provides:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest.

It is obvious from the text of the QTA, and well established through judicial decision, that a party in a QTA action must claim an ownership interest in the property in dispute. See *Block* v. *North Dakota*, 461 U.S. 273, 276 (1983) (The QTA authorizes "civil actions to adjudicate title disputes involving real property in which the United States claims an interest."); see also, *e.g.*, *Long* v. *Area Manager, Bureau of Reclamation*, 236 F.3d 910, 915 (8th Cir. 2001) (The plaintiff could not assert a QTA claim because he "does not claim a property interest to which title may be quieted."); *Pai 'Ohana* v. *United States*, 875 F. Supp. 680, 693 (D. Haw. 1995) (The "word 'title' as used in 28 U.S.C. § 2409a connotes an ownership interest."), aff'd, 76 F.3d 280 (9th Cir. 1996); *Borough of Maywood* v. *United States*, 679 F. Supp. 413, 418 (D.N.J. 1988) (The Borough could not assert a QTA claim "since it has no right or title in the property."); *Claxton* v. *SBA*, 525 F. Supp. 777, 784 (S.D. Ga. 1981) (To "come within the class of beneficiaries envisioned by section 2409a" a party must "have *title or color of title to land* in which the United States also claims an interest.") (citation omitted);

Tudor v. *Members of Ark. State Parks, Recreation & Travel Comm'n*, 83 F.R.D. 165, 172 (E.D. Ark. 1979) ("The legislative history of § 2409a [H.R. Rep. No. 1559, 92d Cong., 2d Sess. 10 (1972)] convinces us that Congress intended to limit the scope* * * to those parties who have title or color of title to land in which the United States also claims an interest.").

Movants do not claim any property interest in the marine submerged lands at issue. Rather, they claim that, if the United States has title to certain of the submerged lands at issue here, they would be entitled to seek permits, pursuant to ANILCA, to gather herring roe on kelp from those lands. See Mot. 5. That interest does not provide a sufficient basis for intervention in this original action. For present purposes, movants are no different from countless other entities, such as hunters, campers, hikers, logging companies, or even other asserted subsistence users, who may also be interested in the outcome of this litigation. Indeed, many of those other entities may actually have permits to make use of federal lands, something movants do not possess.

Like the City of Philadelphia in *New Jersey* v. *New York*, *supra*, the movants in this case lack an interest that is distinct from that of numerous other members of the population. Hence, if movants were allowed to intervene, the Court would find it difficult to deny intervention to a wide variety of other parties who may have an interest in whether the United States or the State of Alaska has title to some or all of the lands in question. The geographic scope of this title dispute is immense, embracing marine submerged lands throughout southeastern Alaska. The presence of private parties in this litigation, each with its own perspective of how particular public lands should be utilized, would

hamper efficient resolution of this inter-sovereign dispute. It would run the risk of expanding this case even beyond "the dimensions of ordinary class actions," 345 U.S. at 373, and "greatly increasing the complexity of this litigation," *Utah*, 394 U.S. at 95-96.

Movants contend (Mot. 5-6) that they are entitled to intervene on the basis of this Court's decision in *Arizona* v. *California*, *supra*, which allowed five Indian Tribes to intervene in an ongoing dispute over apportionment of the Colorado River. See 460 U.S. at 614-615. The intervenors in that case, however, had distinct interests that are clearly distinguishable from those of the movants here. The intervenors there were federally recognized Indian Tribes that each had a preexisting right under this Court's 1964 decree to a share of the water apportionment. See *Arizona* v. *California*, 376 U.S. 340, 343-345 (1964). The movants here, by contrast, are not federally recognized Indian Tribes and they have no claim to ownership of the submerged lands at issue in this case.

The movants instead assert interests basically similar to the interests that have been found insufficient to support intervention in other original actions. See *Arizona* v. *California*, 530 U.S. 392, 419 n.6 (2000) (noting that federal lessees who "do not own land in the disputed area" and make "no claim to title or water rights" were not entitled in intervene in an interstate water dispute) (internal quotation marks omitted); *Nebraska* v. *Wyoming*, 507 U.S. 584, 589-590 (1993) (noting that the Special Master recommended denial of motions of various water users to intervene in an interstate water dispute, and those parties did not file exceptions to the Master's recommendation). The movants fall far short of establishing an entitlement to intervene in this case.

CONCLUSION

For the foregoing reasons, the Court should deny the movants' motion for leave to intervene and file an answer.

Respectfully submitted.

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APRIL 2001